59804 c

84

Supreme Court, U.S.
FILED
FEB 28 2008
OFFICE OF THE CLERK

(6) (7)

58pcp Nos. 06-1666 and 07-394

In the Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL.,
Petitioners,

v.

SANDRA K. OMAR & AHMED S. OMAR,
AS NEXT FRIENDS OF SHAWQI AHMAD OMAR
Respondents.

MOHAMMAD MUNAF, ET AL.,
Petitioners,

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* NON-GOVERNMENTAL ORGANIZATIONS IN SUPPORT OF PETITIONERS IN *MUNAF v. GEREN*, No. 06-1666, AND IN SUPPORT OF RESPONDENTS IN *GEREN v. OMAR*, No. 07-394

BAHER AZMY
JENNY-BROOKE CONDON
SETON HALL UNIVERSITY
SCHOOL OF LAW
CENTER FOR SOCIAL
JUSTICE
ONE NEWARK CENTER
NEWARK, NJ 07102
(973) 642-8700

JOHN J. GIBBONS
COUNSEL OF RECORD
LAWRENCE S. LUSTBERG
AVIDAN Y. COVER
GIBBONS P.C.
ONE GATEWAY CENTER
NEWARK, NJ 07102
(973) 596-4500

COUNSEL FOR AMICI CURIAE

LEGAL PRINTERS, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. OMAR AND MUNAF FACE A SUBSTANTIAL RISK OF TORTURE UPON TRANSFER TO IRAQI AUTHORITIES 4

A. Torture Is A Pervasive Part of the Iraqi Detention and Criminal Justice System 6

B. As Sunni Muslims, Omar and Munaf Face An Even Greater Risk Of Torture By The Predominantly Shiite Authorities 12

II. UNITED STATES LAW PROHIBITS THE TRANSFER OF OMAR AND MUNAF GIVEN THE SUBSTANTIAL RISK OF TORTURE BY IRAQI OFFICIALS 14

A. The Convention Against Torture And Its Implementing Legislation Categorically Prohibit The Transfer Of Omar And Munaf Into A Situation Where They Would Be Likely To Face Torture By Third Parties, Even If The Transfer Occurs Abroad 15

1. FARRA, Which Prohibits Transfers Into a Substantial Risk of Torture Anywhere in the World, Is Fully Enforceable Through Habeas Corpus 17

a. FARRA is Fully Enforceable Through Habeas Corpus.....17

b. FARRA's Broad Prohibition on Transfer Applies Extraterritorially 19

2. On Remand, the Habeas Petitioners are Entitled to a Hearing in Which they Can Present Specific Evidence Relating to their Risk of Torture.....21

B. The Due Process Clause Prohibits The Government From Transferring U.S. Citizens Into The Custody Of Another Sovereign Where Torture Is Likely 23

C. Neither Separation of Powers Principles Nor the Rule of Non-Inquiry Prohibit Judicial Inquiry into the Risk of Torture Upon Transfer.....28

1. The Government Cannot Invoke the Rule of Non-Inquiry Where it has Failed to Abide by any of the Preconditions that Might Trigger its Application 30

2. Even if the Rule of Non-Inquiry Could be Applied Outside the Extradition Context, It Would Have No Relevance to the Statutory and Constitutional Claims Asserted by Omar and Munaf.....32

a. The Passage of FARRA Mandates Judicial Inquiry into the Risk of Torture 32

b. The Rule of Non-Inquiry Does Not Bar Challenges to the Constitutionality of U.S. Government Conduct.....35

c. The Rule of Non-Inquiry Itself Contains a Well-Recognized Exception for Transfers Into Torture 36

CONCLUSION.....38

APPENDIX.....A-1

TABLE OF AUTHORITIES

Page(s)

CASES

Abdah v. Bush,
2005 WL 589812 (D.D.C. 2005).....34

Abu Ali v. Ashcroft,
350 F. Supp. 2d 28 (D.D.C. 2004) 23, 27

Adams v. United States,
317 U.S. 269 (1942) 15

Al-Anazi v. Bush,
370 F. Supp. 2d. 188 (D.D.C. 2005) 34

Alhami v. Bush,
No. 05-359, (D.D.C. Oct. 2, 2007).....15

Al-Joudi v. Bush,
406 F. Supp. 2d. 13 (D.D.C. 2005) 34

Al-Marri v. Bush,
2005 WL 774843 (D.D.C. 2005).....34

Al-Shihry v. Bush,
2005 WL 1384680 (D.D.C. 2005).....34

Belbacha v. Bush,
No. 07-5258 (D.C. Cir. Dec. 31, 2007).....15

Bowers v. DeVito,
686 F.2d 616 (7th Cir. 1982) 26

Butera v. District of Columbia,
235 F.3d 637 (D.C. Cir. 2001) 4, 24

Cadet v. Bulger,
377 F.3d 1173 (11th Cir. 2004) 18, 19

Chavez v. Martinez,
538 U.S. 760 (2003) 3, 23

Cornejo-Barreto v. Seifert,
218 F.3d 1004 (9th Cir. 2000) 19, 35

Demore v. Kim,
538 U.S. 510 (2003) 19

DeShaney v. Winnebago County Dept. of Social Services,
489 U.S. 189 (1989) 23, 24, 27

El-Banna v. Bush,
2005 WL 1903561 (D.D.C. 2005).....34

Farmer v. Brennan,
511 U.S. 825 (1994) 27

Freeman v. Ferguson,
911 F.2d 52 (8th Cir. 1990) 24

Gallina v. Fraser,
278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960) 30, 36

Guerra v. Gonzales,
138 Fed. App'x 697 (5th Cir. 2005) 28

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) 2, 36

Hoxha v. Levi,
465 F.3d 554 (3d Cir. 2006).....37

In re Artt,
158 F.3d 462 (9th Cir. 1998) 33

In re Burt,
737 F.2d 1477 (7th Cir. 1984) 36

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 33

INS v. St. Cyr,
533 U.S. 289 (2001) 18

Kaczmarczyk v. I.N.S.,
933 F.2d 588 (7th Cir. 1991) 6, 22

Kallstrom v. City of Columbus,
136 F.3d 1055 (6th Cir. 1998) 24

Kamara v. Att'y Gen. of the U.S.,
420 F.3d 202 (3d Cir. 2005).....28

Kennedy v. City of Ridgefield,
439 F.3d 1055 (9th Cir. 2006) 24

Khouzam v. Hogan,
No. 07-0992 (M.D. Pa. Jan. 10, 2008).....18, 34

Kneipp v. Tedder,
95 F.3d 1199 (3d Cir. 1996).....27

Koskotas v. Roche,
931 F.2d 169 (1st Cir. 1991).....31, 34

Lockhart-Bembery v. Sauro,
498 F.3d 69 (1st Cir. 2007).....24

Lopez-Smith v. Hood,
121 F.3d 1322 (9th Cir. 1997) 31, 37

Milwaukee v. Illinois,
451 U.S. 304 (1981) 32

Mironescu v. Costner,
480 F.3d 664 (4th Cir. 2007) 19, 33, 35

Murray v. Schooner Charming Betsy,
6 U.S. 64 (1804) 21

Neely v. Henkel,
180 U.S. 109 (1901) 35

Ogbudimpka v. Ashcroft,
342 F.3d 207 (3d Cir 2003).....18, 19

Omar v. Harvey,
No. 01-2374 (D.D.C. Apr. 21, 2006) 26

Ordinola v. Hackman,
478 F.3d 588 (4th Cir. 2007) 34

Parretti v. United States,
122 F.3d 758 (9th Cir. 1997) 37

Pena v. DePrisco,
432 F.3d 98 (2d Cir. 2004).....24

Pinder v. Johnson,
54 F.3d 1169 (4th Cir. 1995) 24

Prasoprat v. Benov,
421 F.3d at 1016 (9th Cir. 2005), *cert denied*, 546 U.S. 1171 (2006) 31, 33

Reed v. Gardner,
986 F.2d 1122 (7th Cir. 1993) 24

Reid v. Covert,
354 U.S. 1 (1957) 23, 35

Rochin v. California,
342 U.S. 165 (1953) 3, 23

Rojas v. INS,
937 F.2d 186 (5th Cir. 1991) 6, 22

Saint Fort v. Ashcroft,
329 F.3d 191 (1st Cir. 2003).....18, 19

Sale v. Haitian Ctrs. Council,
509 U.S. 155 (1993) 20

Singh v. Ashcroft,
351 F.3d 435 (9th Cir. 2003) 19

Tel-Oren v. Libyan Arab Republic,
726 F.2d 774 (D.C. Cir. 1984) 17

Uhlrig v. Harder,
64 F.3d 567 (10th Cir. 1995) 24

United States v. Kin-Hong,
110 F.3d 103 (1st Cir. 1997).....30, 31, 37

United States v. Price,
383 U.S. 787 (1966) 3, 23, 24

United States. v. Karake,
281 F. Supp. 2d 302 (D.D.C. 2003) 27

Wang v. Ashcroft,
320 F.3d 130 (2d Cir. 2003).....18, 19

Wang v. Reno,
81 F.3d 808 (9th Cir. 1996) 28, 36

Wood v. Ostrander,
879 F.2d 583 (9th Cir. 1989) 24

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 30

STATUTES AND REGULATIONS

Foreign Affairs Reform and Restructuring Act
of 1998.....passim

18 U.S.C. § 3184.....30, 34

18 U.S.C. § 3186 31

18 U.S.C. § 3196 31

18 U.S.C. § 371 25

28 U.S.C. § 1651(a) 15

28 U.S.C. § 2241(c)(3) 18

22 C.F.R. § 95.1(c) 22

22 C.F.R. § 95.2(b) 22

22 C.F.R. § 95.2(b)(2) 22

8 C.F.R. § 208.16(c)(2) 22

8 C.F.R. § 208.16(c)(3) 22

OTHER AUTHORITIES

Amnesty Int'l, *Unjust and Unfair: The Death Penalty in Iraq* (Apr. 2007) 9

Carlos M. Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l Law 695 (1995) 17

Committee Against Torture, General Comment 1, *Communications concerning the return of a person to a*

State where there may be grounds he would be subjected to torture (article 3 in the context of article 22), U.N. Doc. A/53/44, annex IX at 52 (1998).....22

Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture Concerning the Second Report of the United States of America*, U.N. Doc. CAT/C/USA/CO/2, July 25, 2006.....20

Convention Relating to the Status of Refugees, art. 33.1, 19 U.S.T. 6259, 189 U.N.T.S. 150 16

David Johnson, *U.S. Struggles to Tutor Iraqis in Rule of Law*, N.Y. Times, Feb. 16, 2008.....10

Ellen Knickmeyer, *Inspectors Find More Torture at Iraqi Jails*, Wash. Post, Apr. 24, 2006.....8

Human Rights Committee, General Comment 20, U.N. Doc. A/47/40 (1992) 16

Human Rights Watch, HRW Index No. E1701, Vol. 17, No. 1(E), The New Iraq? Torture and ill-treatment of detainees in Iraqi custody (2005).....7

Human Rights Watch, World Report 2006.....13

Human Rights Watch,
World Report 2007 (2007) 7

Human Rights Watch,
World Report 2008 (2008) 7

International Covenant on Civil and Political
Rights, G.A. Res. 2200A (XXI), U.N. Doc.
A/6316 (Dec. 16, 1966).....16

J. Herman Burgers & Hans Danelius, *The
United Nations Convention Against
Torture: A Handbook On The Convention
Against Torture And Other Cruel,
Inhuman, Or Degrading Treatment Or
Punishment* (1988) 20

James A. Baker et al., The Iraq Study Group
Report (2006) 12

Jeffrey Fleishman & Asmaa Waguih,
*Iraqi Security Tactics Evoke the Hussein
Era*, L.A. Times, June 19, 2005.....7, 9

Jonathan Finer & Ellen Knickmeyer, *Shiite
Militias Control Prisons, Official Says*,
Wash. Post., June 16, 2006 13

Joshua Partlow, *New Detainees Strain Iraq's
Jails*, Wash. Post, May 15, 2007 8

Khan v. Canada,
Comm. No. 15/1994, U.N. Doc. A/50/44
(1994) 10

Kirk Semple & Alissa J. Rubin, *Sweeps in Iraq Cram Two Jails*, N.Y. Times, Mar. 28, 2007 13

Kirk Semple, *Suspects Still at Large in Iraqi Torture Case*, N.Y. Times, Nov. 8, 2006 12

Laura MacInnis, *U.N. Expert Says Torture in Iraq is "out of hand,"* Reuters News, Sept. 21, 2006 7

Louis Henkin, *Treaties in a Constitutional Democracy*, 10 Mich. J. Int'l L. 406 (1989) 17

M. Cherif Bassiouni, *The Law of International Extradition: United States Law and Practice* (5th ed. 2007) 14, 30, 35

Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 Fla. J. Int'l L. 1 (2006) 7

Michael Moss, *Country in Tatters has Legal System to Match: Courts in Iraq are Riddled with Problems*, Int'l Herald Tribune, Dec. 18, 2006 11

Molly Hennessy-Fiske, *Iraq Jails in "Appalling" State*, L.A. Times, July 21, 2007 11

National Security Council,
Executive Office of the President,
Benchmark Assessment Report (2007).....14

Peter Beaumont, *US Military police raid detention centre to stop abuse of prisoners*,
The Guardian, June 30, 2004 9

Richard A. Oppel, Jr., *Iraqi Police Cited in Abuses May Lose Aid*, N.Y. Times, Sept. 30, 2006.....10

S. Exec. Rpt. 101-30 (1990).....17

S.C. Res. 1770, ¶ 2(c),
U.N. Doc. S/RES/1770 (Aug. 10, 2007) 6

Sam Dagher, *Trying and Shaming Insurgents on Prime Time Iraqi TV*,
Agence France Presse, Mar. 14, 2005.....9

Solomon Moore,
Thousands of New Prisoners Overwhelm Iraqi System, N.Y. Times, Feb. 14, 2008.....10, 12, 13

U.S. Dep't of State,
Iraq: Country Reports on Human Rights Practices – 2005 (Mar. 8, 2006).....6

U.S. Dep't of State,
Iraq: Country Reports on Human Rights Practices – 2006 (Mar. 6, 2007).....6

U.S. Dep't of State, Bureau of Near East Affairs, Iraq Weekly Status Report 7 (Sept. 26, 2007).....9

U.S. Dep't of State, Iraq: Country Reports for Human Rights – 2004 (Feb. 28, 2005).....6

UNAMI Human Rights Report: 1 January – 31 March 2007 25 (2007).....11

UNAMI, Human Rights Report: 1 April – 30 June 2007, at 4 (2007).....7

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT" or "the Convention"),1465 U.N.T.S. 85 (Dec. 10 1984).....passim

STATEMENT OF AMICI[1]

Amici curiae Non-Governmental Organizations, Human Rights Watch, Human Rights First, Center for Constitutional Rights, Physicians for Human Rights, Islamic Society of North America, Evangelicals for Human Rights and Muslim Advocates, are not-for-profit public interest entities united in their common desire to eradicate torture and other cruel, inhuman and degrading practices across the world.[2] Through litigation, research, public education and advocacy, including for some *amici*, faith-based advocacy, *amici* have worked to ensure that the United States, as the historic leader in the development of fundamental human rights norms, abides by its obligations under the Constitution, laws and treaties to protect individuals in custody from torture, even that which might happen at the hands of third parties.

Amici are deeply concerned by the sweeping claim advanced by the government in these cases, that the executive is entirely unconstrained by law to effectuate the transfer of a person out of its custody, where there are substantial grounds for believing that person would be tortured. While *amici* take no formal position on the jurisdictional

---

[1] No counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters of consent from the parties have been filed with the Clerk's office along with this brief.

[2] A full statement of each *amicus'* interest can be found in the Appendix.

question presented in this appeal, they write to inform the Court of the strong factual basis for believing Mr. Shawqi Ahmad Omar and Mr. Mohammad Munaf ("Habeas Petitioners"), particularly because they are Sunni Muslims, will suffer torture and abuse at the hands of Iraqi prison officials. *Amici* also write to clarify that the United Nations Convention Against Torture, as implemented through domestic legislation, and the Fifth Amendment to the United States Constitution preclude precisely the type of extrajudicial transfer proposed by the executive here. *Amici* thus urge this Court to recognize that the judicial branch should act consistently with its historic role to protect individuals from lawless executive action. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

SUMMARY OF ARGUMENT

The United States Department of State, as well as numerous non-governmental institutions and regular media reports, have documented a consistent pattern of flagrant, gross and widespread human rights abuses in Iraq, including pervasive torture in Iraqi detention facilities. Because torture is so prevalent throughout all aspects of the Iraqi detention and criminal justice systems, and because Sunni Muslims are regularly targeted for abuse by Shiite prison officials, the Habeas Petitioners would face a serious risk of torture upon transfer into the hands of the Iraqi government.

Contrary to its central contention, the government does not possess unlimited authority to

transfer Omar and Munaf into Iraqi custody. In addition to the arguments advanced by the Habeas Petitioners regarding the requirement that the government demonstrate affirmative statutory or constitutional power to transfer citizens into foreign custody, *amici* write to highlight two independent limits on the government's transfer authority.

First, the United Nations Convention Against Torture ("CAT"), as implemented domestically by the Foreign Affairs Reform and Restructuring Act ("FARRA" or "the Act"), categorically prohibits the government from transferring Omar and Munaf into the custody of a state when there are substantial grounds to believe they would be tortured. This absolute prohibition, fully enforceable through the habeas statute, applies even where the proposed transfer occurs outside U.S. territory.

Second, the Due Process Clause of the Fifth Amendment places a substantive limit on government actions against citizens that would shock the conscience. *See Rochin v. California*, 342 U.S. 165 (1953). Torture is conscience-shocking conduct, *see Chavez v. Martinez*, 538 U.S. 760, 773 (2003) (plurality op.), as are government actions that would make torture at the hands of third parties more likely, *United States v. Price*, 383 U.S. 787, 790 (1966). The allegations presented by each of the Habeas Petitioners demonstrate that, but for the unlawful actions of the government (including the proposed extrajudicial transfer), Omar and Munaf would not be facing a substantial risk of torture; they thus state a substantive due process claim

requiring adjudication on remand. *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001).

Finally, contrary to the government's suggestion, the rule of non-inquiry – a doctrine that applies only when the government follows the statutorily-mandated extradition procedures that trigger its application – has absolutely no relevance to the adjudication of these claims. As a common law principle, the rule of non-inquiry is abrogated by both FARRA and the Constitution. In addition, the rule of non-inquiry itself contains an important exception authorizing judicial inquiry into transfers into torture.

ARGUMENT

I. OMAR AND MUNAF FACE A SUBSTANTIAL RISK OF TORTURE UPON TRANSFER TO IRAQI AUTHORITIES.

The district court in Mr. Omar's case enjoined his transfer in part because Omar faced a strong possibility of torture at the hands of Iraqi government officials.[3] In issuing a temporary restraining order, the district judge emphasized that, as a Sunni Muslim, Omar would be particularly vulnerable to torture because Iraqi

---

[3] Joint Appendix ("J.A.") 158. That conclusion was in turn informed by specific evidence presented by Omar that he "would be at grave and serious risk of being tortured if he were turned over to the Iraqi criminal authorities." J.A. 151-52 (Decl. Curt Goering, Deputy Executive. Dir., Amnesty Int'l, USA).

authorities "condoned the torture of Sunni prisoners and used their police powers to settle sectarian scores."[4]

The district court's conclusions are well-founded. The U.S. State Department, the United Nations, several humanitarian organizations and the media, have all repeatedly concluded that torture and cruel, inhuman and degrading treatment is an endemic and pervasive feature of the Iraqi criminal justice and detention systems, from investigation to sentencing. Iraqi officials have propagated the practices, inherited from the prior regime, of coercing confessions and gratuitously abusing prisoners. Moreover, the Shiite command of detention facilities has resulted in widespread targeting of Sunni prisoners for torture or abuse – particularly those asserted to have engaged in security-related crimes.

Notably, the government has never even attempted to rebut the evidence – much of it from the U.S. government itself – of the prevalence of torture throughout the Iraqi criminal justice system. It is thus uncontested on this record that Habeas Petitioners would face a grave risk of torture upon transfer into Iraqi custody.

---

[4] J.A. 158.

A. Torture Is A Pervasive Part of the Iraqi Detention and Criminal Justice System.

The most recent State Department Human Rights Report on Iraq observes that "significant human rights problems" persist in Iraqi jails, including "torture and other cruel, inhuman, or degrading punishment" and recounts "[a]busive interrogation practices" including "rape, torture and abuse, sometimes leading to death."[5] This report confirms conclusions reached by the State Department for consecutive years[6] – conclusions that should be given great weight by the courts.[7]

The Human Rights Office of the United Nations Assistance Mission for Iraq ("UNAMI")[8] has

---

[5] U.S. Dep't of State, Iraq: Country Reports on Human Rights Practices – 2006 (Mar. 6, 2007) http://www.state.gov/g/drl/rls/hrrpt/2006/78853.htm.

[6] *See* U.S. Dep't of State, Iraq: Country Reports on Human Rights Practices – 2005 (Mar. 8, 2006), http://www.state.gov/g/drl/rls/hrrpt/2005/61689.htm; U.S. Dep't of State, Iraq: Country Reports for Human Rights – 2004 (Feb. 28, 2005), http://www.state.gov/g/drl/rls/hrrpt/2004/41722.htm.

[7] *Kaczmarczyk v. I.N.S.*, 933 F.2d 588, 594 (7th Cir. 1991) (in evaluating country conditions, courts "give considerable weight to [State] Department's opinion"); *Rojas v. INS*, 937 F.2d 186, 190 n.1 (5th Cir. 1991) (State Departme. t Country Reports are "the most appropriate and perhaps the best resource" for "information on political situations in foreign nations").

[8] UNAMI is authorized to "promote the protection of human rights and judicial and legal reform in order to strengthen the rule of law in Iraq," and has published detailed reports on human rights violations in Iraq since July 2005. S.C. Res. 1770, ¶ 2(c), U.N. Doc. S/RES/1770 (Aug. 10, 2007).

expressed grave concerns over the "continuing reports of the widespread and routine torture or ill-treatment of detainees."[9] Similarly, the 2008 country conditions report from Human Rights Watch concludes that torture and abuse in Iraqi detention facilities remain "common."[10] The U.N. Special Rapporteur on Torture concluded that torture in Iraqi-run detention facilities was "completely out of hand" and that "[t]he situation is so bad that many people say that it is worse than in the times of Saddam Hussein."[11]

Indeed, the various forms of torture employed by government officials recall the "old habits" of the Saddam Hussein regime.[12] These tactics include:

---

[9] UNAMI, Human Rights Report: 1 April – 30 June 2007, at 4 (2007), http://www.uniraq.org/FileLib/misc/HR%20Report%20Apr%20Jun%202007%20EN.pdf ("UNAMI Report").

[10] Human Rights Watch, World Report 2008, at 478 (2008); *see also* Human Rights Watch, World Report 2007, at 469-71 (2007) (government officials "systematically tortur[e] and kill[] detainees in their custody"); Human Rights Watch, HRW Index No. E1701, Vol. 17, No. 1(E), The New Iraq? Torture and ill-treatment of detainees in Iraqi custody 4, 11 (2005) (of ninety detainees interviewed, seventy-two alleged they had been tortured or ill-treated).

[11] Laura MacInnis, *U.N. Expert Says Torture in Iraq is "out of hand,"* Reuters News, Sept. 21, 2006.

[12] *See* Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 Fla. J. Int'l L. 1, 107 n.443 (2006) ("[O]ld habits are hard to break, and apparently many Iraqi police officers would rather break bones than the habit of relying on torture to elicit confessions."); Jeffrey Fleishman & Asmaa Waguih, *Iraqi Security Tactics Evoke the Hussein Era*, L.A. Times, June 19, 2005, at A1.

> routine beatings with hosepipes, cables and other implements . . . prolonged suspension from the limbs in contorted and painful positions for extended periods, sometimes resulting in dislocation of the joints; electric shocks to sensitive parts of the body; the breaking of limbs; . . . and severe burns to parts of the body through the application of heated implements.[13]

One detainee recently recounted, "[Iraqi guards] hung me in the air by my legs and beat me with a stick . . . . They beat me with pipes on my back and stomach;" those guards also burned the detainee's hands with electric shocks and refused him food for three days.[14]

In addition to the serious sectarian conflict described *infra* at Part I.B., several factors appear to contribute to the prevalence of torture in the Iraqi criminal justice system: the perilous security situation throughout Iraq;[15] an inherited culture of

---

[13] UNAMI Report, *supra* note 9, at 23; *see* U.S. Dep't of State, *supra* note 5 ("application of electric shocks, fingernail extractions . . . sexual assault, and . . . gunshot wounds."); *see also* J.A. 151 (Decl. Curt Goering) (use of "cigarettes to burn body parts, use of electric drills on arms and legs, and suffocation.").

[14] Joshua Partlow, *New Detainees Strain Iraq's Jails*, Wash. Post, May 15, 2007, at A01; *see also* Ellen Knickmeyer, *Inspectors Find More Torture at Iraqi Jails*, Wash. Post, Apr. 24, 2006, at A01.

[15] *See infra* note 32 (describing vengeance actions against persons suspected of committing security-related crimes).

policing and interrogation in which conviction by confession is celebrated for its efficiency;[16] and a generalized disregard for human rights.[17] Coercion in the criminal justice process is so acculturated and routine that forced confessions are televised to the public.[18] Asked to comment on this practice, an Iraqi Minister for Human Rights praised their perceived utility: "they have a sobering effect on people."[19]

Despite international pressure, the Iraqi government has done little to address the mass human rights violations in detention facilities, suggesting that abuses will likely continue.[20] While

---

[16] *See* Frank, *supra* note 12, at 107-08; *see also* U.S. Dep't of State, Bureau of Near East Affairs, Iraq Weekly Status Report 7 (Sept. 26, 2007), http://www.state.gov/documents/organization/93029.pdf (Iraqi official "order[ed] officers to abuse their captives into making false confessions").

[17] Fleishman & Waguih, *supra* note 12, at A1 ("atmosphere of hidden brutalities" against detainees, emerged in part because many police officers "come from a culture of torture"); Peter Beaumont, *US Military police raid detention centre to stop abuse of prisoners*, The Guardian, June 30, 2004, at 4 (quoting Iraqi criminal intelligence officer, "[t]he American asked me why we had beaten the prisoners. I said we beat the prisoners because they are all bad people.").

[18] Amnesty Int'l, Unjust and Unfair: The Death Penalty in Iraq 21-25 (Apr. 2007), http://www.amnesty.org/en/alfresco_asset/198eace3-a31a-11dc-8d74-6f45f39984e5/mde140142007en.pdf.

[19] Sam Dagher, *Trying and Shaming Insurgents on Prime Time Iraqi TV*, Agence France Presse, Mar. 14, 2005. According to one Iraqi law professor, "you have a military and not a judicial body interrogating and charging people." *Id.*

[20] U.S. Dep't of State, *supra* note 5 ("[G]overnment institutions were greatly stressed and faced difficulty in

the Iraqi Ministry of Human Rights has assumed a formal inspection role over detention facilities, there has been "no discernible change in approach by the Government of Iraq towards the issue of detainee abuse and the importance of holding perpetrators criminally liable for such crimes."[21] And, because Iraq is not a party to the United Nations Convention Against Torture,[22] Omar and Munaf could not even apply to the Committee against Torture for protection from torture by the Iraqis.[23]

Moreover, the Baghdad Security Plan, initiated in February 2007, has overwhelmed the already strained Iraqi judicial and detention systems.[24] The immense overcrowding of Iraqi facilities and the corresponding lack of judicial oversight make torture and abuse all the more

---

successfully responding to the challenges presented by widespread human rights abuses."); *see also* David Johnson, *U.S. Struggles to Tutor Iraqis in Rule of Law*, N.Y. Times, Feb. 16, 2008, at A8.

[21] UNAMI Report, *supra* note 9, at 4; *see also* Richard A. Oppel, Jr., *Iraqi Police Cited in Abuses May Lose Aid*, N.Y. Times, Sept. 30, 2006, at A1.

[22] *See* CAT, Status of Ratification (Oct. 2, 2007), http://www2ohchr.org/english/bodies/ratification/9.htm.

[23] *Khan v. Canada*, Comm. No. 15/1994, ¶ 12.5, U.N. Doc. A/50/44 (1994) (fact that Pakistan was not party to Convention heightens risk of torture).

[24] Solomon Moore, *Thousands of New Prisoners Overwhelm Iraqi System*, N.Y. Times, Feb. 14, 2008, at A16 (overflow in all Iraqi prisons, including Justice Ministry prisons).

likely.[25] Indeed, the Iraqi criminal justice system contributes to the spread of torture throughout the prisons. For example, trials conducted by Iraqi judges are so summary that they fail to provide defendants with a meaningful opportunity to contest the charges against them or raise the issue of torture by guards and interrogators. UNAMI explains that, in part because of the dearth of evidence presented and lack of participation by counsel, trial proceedings "are typically brief in nature, with sessions lasting on average some fifteen to thirty minutes, during which time the entire trial is concluded."[26] Even capital or serious felony cases typically involve judicial deliberations lasting only "several minutes for each trial."[27]

Mr. Munaf received just this form of truncated justice. He was afforded a summary "trial" during which he protested that his prior confession was coerced by threat of torture. The Central Criminal Court of Iraq ignored his protest and, following an *ex*

---

[25] UNAMI Report, *supra* note 9, at 4 (pace of arrests following "surge" has "exceeded the authorities' ability to ensure judicial oversight for detainee population."); Molly Hennessy-Fiske, *Iraq Jails in "Appalling" State*, L.A. Times, July 21, 2007.

[26] UNAMI, Human Rights Report: 1 January – 31 March 2007, at 25 (2007), http://www.uniraq.org/FileLib/misc/HR%20Report%20Jan%20Mar%202007%20EN.pdf; s*ee also* Michael Moss, *Country in Tatters has Legal System to Match: Courts in Iraq are Riddled with Problems*, Int'l Herald Tribune, Dec. 18, 2006.

[27] *See also* UNAMI Report, *supra* note 9, at 33 (calling for death penalty moratorium in light of high risk of coerced conviction and other severe procedural defects).

parte conversation with a U.S. military officer, summarily sentenced him to death.[28]

B. As Sunni Muslims, Omar and Munaf Face An Even Greater Risk Of Torture By The Predominantly Shiite Authorities.

As Sunni Muslims, Omar and Munaf face a particularly heightened risk of torture upon transfer to the custody of Iraqi prison officials, who are predominantly Shiite Muslims. As is well-known, sectarian divisions between Sunni and Shiite Muslims have come to pervade all aspects of Iraqi social and political life, resulting in explosive cycles of violence and revenge for the past several years. According to the Iraq Study Group Report, "the composition of the Iraqi government is basically sectarian, and key players within the government too often act in their sectarian interest."[29] While most police and prison officials are Shiite, most prisoners are Sunni, as a result of which they regularly suffer harsh forms of sectarian revenge at the hands of their guards.[30] The Iraq Study Group concludes that "Iraqi police . . . routinely engage in sectarian violence, including the unnecessary detention, torture, and targeted execution of Sunni Arab civilians."[31] These U.S. government

---

[28] *See* J.A. 55.

[29] James A. Baker et al., *The Iraq Study Group Report* 15 (2006).

[30] Moore, *supra* note 24, at A16.

[31] Baker, *supra* note 29, at 13. Kirk Semple, *Suspects Still at Large in Iraqi Torture Case*, N.Y. Times, Nov. 8, 2006,

conclusions confirm the persistent allegations that Sunni prisoners regularly suffer torture and abuse at the hands of Iraqi police and prison officials.[32]

Furthermore, it appears that Shiite-run armed militias have deeply infiltrated Iraqi prisons, eliminating the possibility of genuine oversight by government ministries, and presenting a dire risk of torture and abuse for Sunni prisoners.[33] According to Iraq's Deputy Justice Minister, "[w]e cannot control the prisons. It's as simple as that. Our jails are infiltrated by the militias from top to bottom, from Basra to Baghdad."[34]

---

at A6 (Shiite-led security forces "seeking sectarian revenge inside ministry-run prisons.").

[32] Kirk Semple & Alissa J. Rubin, *Sweeps in Iraq Cram Two Jails*, N.Y. Times, Mar. 28, 2007, at A1 ("Iraq's detention system has been plagued by reports of torture, secret detentions and mismanagement, and Sunni Arab leaders have accused the Shiite-run government of repeatedly turning a blind eye to widespread abuses of Sunni detainees."). The risk to Omar and Munaf of transfer is heightened further by their denomination by the United States as "security internees," G. Br. 21, because Iraqi officials frequently reserve their harshest of sectarian revenge on prisoners they believe to have engaged in security-related crimes. Human Rights Watch, World Report 2006, at 450 (2006) (particular risk of torture for detainees accused of "security-related offenses").

[33] Moore, *supra* note 24, at A16 (describing alliance between Shiite guards and militias and the use of jails by militias to torture and execute Sunni prisoners).

[34] Jonathan Finer & Ellen Knickmeyer, *Shiite Militias Control Prisons, Official Says*, Wash. Post., June 16, 2006, at A01; *see also* U.S. Dep't of State, *supra* note 5 ("emerging" Shiite militia influence "within the MOJ prison facility

II. UNITED STATES LAW PROHIBITS THE TRANSFER OF OMAR AND MUNAF GIVEN THE SUBSTANTIAL RISK OF TORTURE BY IRAQI OFFICIALS.

Amici agree with the arguments made by the Habeas Petitioners and other *amici*, *see* Brief of *Amicus Curiae* M. Cherif Bassiouni *et al.*, that the executive must possess affirmative authority before transferring a U.S. citizen into the custody of a foreign government. Even if this Court finds that, in these limited circumstances, the government is not required to act pursuant to an affirmative grant of statutory or constitutional power, it is plain that there are important independent limitations on the government's authority in this case. Specifically, both the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT" or "the Convention"), 1465 U.N.T.S. 85 (Dec. 10 1984), implemented by the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), and the substantive due process clause of the Fifth Amendment impose an affirmative obligation against transfer by U.S.

---

system."); National Security Council, Executive Office of the President, Benchmark Assessment Report 17-23 (2007) (continuing Shiite militia control of security forces and government ministries). Thus, the government's contention that the risk of torture to Omar and Munaf is lessened because they will likely be imprisoned in a Ministry of Justice ("MOJ") facility, which assertedly suffer from fewer abuses than Ministry of Interior or Ministry of Defense facilities (Resp'ts' Mem. Opp. Mot. for TRO, 14-15) is plainly contestable, and would require disposition on remand.

officials into the custody of foreign government officials who may torture petitioners. Neither the rule of non-inquiry nor the principles underlying it have any relevance to a court's obligation to consider these claims.

As such, the issuance of a standstill injunction in these cases is an entirely appropriate exercise of a district court's jurisdiction pursuant to its inherent authority and that provided by the All Writs Act, 28 U.S.C. § 1651(a), as it considers the merits of the habeas petitioners' claims. *See Adams v. United States,* 317 U.S. 269, 273 (1942); *see also Belbacha v. Bush*, No. 07-5258, Order Enjoining Transfer (D.C. Cir. Dec. 31, 2007) (enjoining transfer of Guantanamo detainee to home country where petitioner had alleged fear of torture upon transfer); *Alhami v. Bush*, No. 05-359, (D.D.C. Oct. 2, 2007), slip op. at 8 (same).

A. The Convention Against Torture And Its Implementing Legislation Categorically Prohibit The Transfer Of Omar And Munaf Into A Situation Where They Would Be Likely To Face Torture By Third Parties, Even If The Transfer Occurs Abroad.

The Convention prohibits any act of torture, CAT, art. 2.1, as well as the transfer of a person to another country where he may suffer torture. Article 3.1 of CAT specifically provides:

> No State Party shall expel, return ("refouler") or extradite a person to

> another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

CAT, art. 3.1

The Convention's prohibition on transfers into torture is absolute, and applies even if the U.S. government played no role in creating the risk of harm; it admits no exceptions, even where there exists "a state of war or a threat of war, internal political instability or any other public emergency." CAT, art. 2.2. The United States ratified CAT in 1994, and implemented the treaty domestically through FARRA. Pub. L. No. 105-277, div. G, Title XXII, codified as note to 8 U.S.C. § 1231. FARRA, therefore, imposes on U.S. officials an unambiguous obligation to comply with CAT's broad prohibition on such transfers into torture, an obligation fully enforceable by Omar and Munaf through habeas corpus.[35]

---

[35] Other international treaties to which the United States is a party adopt this prohibition on the transfer of a person to a country where he or she is likely to be tortured. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), art. 7; Human Rights Committee, General Comment 20, art. 7, U.N. Doc. A/47/40 (1992) (interpreting Article 7 to require that states "not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."); *see also* Convention Relating to the Status of Refugees, art. 33.1, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 152.

1. FARRA, Which Prohibits Transfers Into a Substantial Risk of Torture Anywhere in the World, Is Fully Enforceable Through Habeas Corpus.

The United States' obligations under CAT are fully binding and enforceable through FARRA. Although Articles 1 through 16 of the Convention, when ratified by the Senate, were deemed not to be "self-executing,"[36] that reservation does not diminish the U.S. government's obligation to comply with the Convention's terms.[37] At most, it suggests some ambiguity about whether the treaty is directly enforceable by Article III courts or in habeas corpus.[38] Regardless, because FARRA implements CAT's Article 3 provision domestically, FARRA's prohibition on transfers into torture is binding law, plainly enforceable through habeas.

a. FARRA is Fully Enforceable Through Habeas Corpus.

FARRA establishes a statutory prohibition against the transfer of a person "to a country in which there are substantial grounds for believing the

---

[36] S. Exec. Rpt. 101-30, at 31 (1990).

[37] Louis Henkin, *Treaties in a Constitutional Democracy*, 10 Mich. J. Int'l L. 406, 425 (1989) ("The international obligation of the United States under a treaty is immediate, whether a treaty is self-executing or not.").

[38] *Compare* Carlos M. Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 719-21 (1995) *with Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring).

person would be in danger of being subjected to torture." FARRA, § 2242(a). The writ of habeas corpus extends to claims that a person is in custody in violation of the laws of the United States. 28 U.S.C. § 2241(c)(3). A person in custody of the United States may, therefore, challenge his detention and related transfer in violation of FARRA just as he or she would challenge the violation of any other federal statute. *See Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003) ("FARRA and the regulations are now the positive law of the United States, and, as such, are cognizable under habeas."); *accord Ogbudimpka v. Ashcroft*, 342 F.3d 207, 220 (3d Cir 2003); *Wang v. Ashcroft*, 320 F.3d 130, 141 n.16 (2d Cir. 2003); *Cadet v. Bulger*, 377 F.3d 1173, 1182 n.7 (11th Cir. 2004); *see also Khouzam v. Hogan*, No. 07-0992, slip op. at 15 (M.D. Pa. Jan. 10, 2008) ("Non-refoulement is the law of the United States.").

The government may argue that § 2242(d) of FARRA, which purports to preclude judicial review over claims arising under the Act, also strips the district court of habeas corpus jurisdiction to hear claims raising violations of § 2242(a) of the Act.[39] Though the assertion is not ripe for this Court's adjudication, it is, in any event, foreclosed by this Court's decision in *INS v. St. Cyr*, which considered a nearly identical jurisdiction-stripping provision.

---

[39] Section 2242(d) provides, in relevant part, that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section."

533 U.S. 289, 298 (2001); *see also Demore v. Kim*, 538 U.S. 510 (2003). Applying the analysis of *St. Cyr* to FARRA, numerous courts have held that § 2242(d) does not contain "specific and unambiguous statutory directives to effect a repeal," *St. Cyr*, 533 U.S. at 299, and that district courts, therefore, retain habeas jurisdiction to consider CAT and FARRA claims. *Ogbudimpka*, 342 F.3d at 215-22; *Cadet*, 377 F.3d at 1182; *Saint Fort*, 329 F.3d at 200-02; *Wang*, 320 F.3d at 140-43; *Singh v. Ashcroft*, 351 F.3d 435, 441-42 (9th Cir. 2003); *see also Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1013 (9th Cir. 2000) (finding no bar to habeas jurisdiction, prior to *St. Cyr* decision). *But see Mironescu v. Costner*, 480 F.3d 664, 673-76 (4th Cir. 2007). Thus, the Habeas Petitioners' CAT claims are not foreclosed; remand for adjudication by the district court is required.

b. FARRA's Broad Prohibition on Transfer Applies Extraterritorially

The government argues that Iraq has exclusive jurisdiction over Omar because he is already in Iraq and that no treaty or statute bars his transfer to Iraqi authorities. G. Br. 38-39. Indeed, the government suggests that, "when the United States has custody of a person in a foreign country, it is a misnomer to refer to the United States 'transferring' the person to that country's custody." G. Br. at 43. However, the government's position is plainly contradicted by the clear language and purpose of CAT and FARRA.

FARRA expressly covers *any* hand-over from one sovereign to another, prohibiting the United States from "expel[ing], extradit[ing], or *otherwise effect[ing]* the involuntary return" of a person. § 2242(a) (emphasis added). FARRA ensures that this obligation applies "*regardless of whether the person is physically present in the United States.*" *Id.* (emphasis added). This absolute – and extraterritorial – prohibition on transfers to likely torture is also mandated by Article 3 of the Convention.[40] The drafters intended Article 3 to apply to "any person who, *for whatever reason*, is in danger of being subjected to torture if handed over to another country . . . [and to] *cover all measures* by which a person is physically transferred to another state."[41] It also applies in military occupations.[42] An

---

[40] FARRA's clear and explicit language, (as well as CAT's drafting history) thus renders inapposite the Court's decision in *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993), to decline extraterritorial application of the Immigration and Nationality Act, which contains no such express terms.

[41] J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook On The Convention Against Torture And Other Cruel, Inhuman, Or Degrading Treatment Or Punishment* ("Handbook on CAT") 125-26 (1988) (emphasis added); *see also* Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture Concerning the Second Report of the United States of America*, ¶ 20, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) ("Committee Conclusions") (Article 3 applies extraterritorially).

[42] Burgers & Danelius, *Handbook on CAT* at 131 (CAT meant to apply to "territories under military occupation, to colonial territories and to any other territories over which a State has factual control."); *see also* Committee Conclusions, ¶ 15 (territory under State party's jurisdiction "includes all

interpretation of FARRA that would permit an extraterritorial transfer, therefore, would not only violate the statute's plain terms, it would also be inconsistent with well-settled international law interpretations of CAT. *See Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

2. On Remand, the Habeas Petitioners are Entitled to a Hearing in Which they Can Present Specific Evidence Relating to their Risk of Torture.

Although the Department of Defense ("DoD") has not issued regulations pursuant to § 2242(b) of FARRA, the absence of regulations does not absolve the DoD from its legal obligations under the treaty and the statute not to transfer persons into torture. This Court, of course, need not adjudicate the legal or factual allegations relating to petitioners' CAT and FARRA claims. Rather, the district court on remand is positioned to resolve any contested questions about the legal scope of CAT and FARRA, and conduct a factual hearing on the merits of petitioners' FARRA and CAT claims.

In particular, FARRA and CAT both prohibit the transfer of a person where there are "substantial grounds for believing the person would be in danger of being subjected to torture," *see* § 2242(a); CAT, art. 3.1. District courts regularly interpret this

---

areas under the de facto effective control of the state party, by whichever military or civil authorities such control is exercised.").

requirement under regulations which employ a "more likely than not" standard. 8 C.F.R. § 208.16(c)(2); 22 C.F.R. §§ 95.1(c), 95.2(b).[43] In making that assessment, the district court may consider "all evidence relevant to the possibility of future torture." §§ 208.16(c)(3); § 95.2(b)(2); *see also* CAT, art. 3.2 (court should "take into account all relevant considerations including . . . a consistent pattern of gross, flagrant or mass violations of human rights.").

This would include testimonial evidence to supplement that already in the record, *see* J.A. at 151, as well as government and non-governmental reports on country conditions documenting systematic torture and abuse. *See supra* Part I. Particularly persuasive to a court would be extensive evidence from the U.S. government itself regarding the prevalence of torture in Iraq and, therefore, the substantial risk Omar and Munaf will face upon transfer into Iraqi criminal custody. *See Kaczmarczyk*, 933 F.2d at 594; *Rojas*, 937 F.2d at 190 n.1. In any event, it certainly was not an abuse of discretion for the district court to have enjoined a

---

[43] *Amici* believe the "substantial grounds" standard of Article 3 of CAT requires a lesser showing of risk than the "more likely than not" standard employed by U.S. domestic regulations implementing FARRA. *See* Committee Against Torture, General Comment 1, *Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22)*, ¶ 6, U.N. Doc. A/53/44, annex IX at 52 (1998). *Amici* believe, however, that Omar and Munaf have stated a strong claim for relief under either standard.

transfer, in light of the strong – and as yet *unrebutted* – evidence of the likelihood of torture before it. *See Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 69 (D.D.C. 2004) (denying government's motion to dismiss because, among other reasons, "the United States has not offered evidence to rebut any of the information supplied" regarding abuse faced by habeas petitioner "even though such evidence is in many instances directly in its control.")

B. The Due Process Clause Prohibits The Government From Transferring U.S. Citizens Into The Custody Of Another Sovereign Where Torture Is Likely.

The Fifth Amendment – unquestionably applicable to U.S. citizens abroad such as Omar and Munaf, *see Reid v. Covert*, 354 U.S. 1 (1957) – prohibits abusive and shocking government conduct, among which torture is the paradigmatic example. *See, e.g., Rochin v. California*, 342 U.S. 165, 172 (1952); *Chavez v. Martinez*, 538 U.S. 760, 773 (2003) (plurality). Just as the government may not itself engage in torture, so it may not hand citizens over to others who will torture, particularly after taking affirmative acts that make the prospect of torture more likely.

Specifically, the Fifth Amendment guarantee of substantive due process prohibits the state from affirmatively exposing citizens to serious harm, irrespective of the source. *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *United States v. Price*, 383 U.S. 787, 790

(1966). Although the Constitution generally does not protect citizens from harm by third parties, in *DeShaney* the Court recognized that a duty to protect may arise if the state played a part in the "creation" of the danger or otherwise rendered a citizen "more vulnerable" to harm. 489 U.S. at 201. Following that reasoning, nearly all of the Circuit Courts of Appeals recognize that the government violates Fifth Amendment protections when it affirmatively places a citizen in danger, even a danger posed by third-parties.[44] This principle is not a novel constitutional theory, but a core principle of due process.[45]

For example, in *United States v. Price*, 383 U.S. 787, 799 (1966), this Court held that due process limits the government's authority to take

---

[44] *See, e.g., Lockhart-Bembery v. Sauro*, 498 F.3d 69 (1st Cir. 2007); *Pena v. DePrisco*, 432 F.3d 98 (2d Cir. 2004); *Kneipp v. Tedder*, 95 F.3d 1199, 1210 (3d Cir. 1996); *Pinder v. Johnson*, 54 F.3d 1169, 1175-77 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 994 (1995); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-67 (6th Cir. 1998); *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir. 1993); *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990); *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989); *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995); *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001).

[45] *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006) ("the 'state-created danger' doctrine predates *DeShaney*" which is "more reasonably understood as an acknowledgment and preservation of the doctrine, rather than its source."); *Butera*, 235 F.3d at 651 (recognition of state-created danger doctrine was "hardly breaking new ground.") (internal citations and quotations omitted).

custody of U.S. citizens and deliver them – without judicial process – into the hands of third-parties who would harm them. In *Price*, the Court found that the facts supported an indictment of Mississippi police officials under 18 U.S.C. § 371, for conspiracy to violate the Fourteenth Amendment, where those officials took actions that made the victims' interception and murder by third parties more likely. The Court noted that "the State, without the semblance of due process of law as required of it by the Fourteenth Amendment, used its sovereign power and office to release the victims from jail so that they were not charged and tried as required by law, but instead could be intercepted and killed." *Id.* at 799. The government here used its "offices" to detain Omar and Munaf and now seeks to transfer them – without any judicial process – into the hands of third parties likely to harm and even execute them.

Omar and Munaf alleged specific misconduct by U.S. officials that render them more vulnerable to torture upon transfer than they otherwise would be absent U.S. action. Petitioners assert that U.S. officials took custody of them without lawful process, J.A. 28-29, 105-106; held them virtually incommunicado, J.A. 27, 105; subjected them to prolonged arbitrary detention without charges for more than two years, J.A. 28, 105; abused them, J.A. 51, 111; interrogated and threatened them and their families with torture and sexual violence, J.A. 51-52, 55, 114; denied them access to counsel, J.A. 27, 34, 114-116; and frustrated access to U.S. consular

officials, J.A. 113. Omar and Munaf thus allege that, but for this government misconduct, they could have proven themselves innocent of wrongdoing before a lawful tribunal and obtained release in a timely manner, J.A. 52, 55, 113, avoiding the prospects of transfer, torture, and imminent death they now confront.

In addition, both Omar and Munaf allege that U.S. officials interrogated them[46] and, in Munaf's case, coerced a false confession, J.A. 51-52, 55. The possibility that U.S. officials would share the fruits of their allegedly illegal interrogations with Iraqi officials as part of a collaborative effort to convict and punish U.S. citizens could rise to the level of a substantive due process violation, in and of itself. *See Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).[47] Of additional concern in Munaf's case, the U.S. officials are alleged to have helped secure his conviction by falsely claiming that a U.S. military official, Lt. Robert M. Pirone, was properly

---

[46] While detained by the United States, Mr. Omar was questioned by American agents who told him they worked for the Federal Bureau of Investigation. Burke Decl., Ex. A to Renewed Request for Access & Motion for Records, para. 6, *Omar v. Harvey*, No. 01-02374 (D.D.C. Apr. 21, 2006) (dkt. 29-3). During these interrogations, Mr. Omar was beaten, and interrogators threatened his wife and son. *Id.*

[47] As part of his trial in the Iraqi Criminal Court, Munaf pleaded that his confession to U.S. officials was procured by torture and was false, but he was convicted anyway on the basis of his confession. J.A. 51-56. Thus, but for the abusive interrogation techniques undertaken by U.S. officials, Munaf may not have faced the grave risk of torture resulting from his conviction and transfer that he now faces.

"appearing on behalf of the Romanian embassy" to register a "formal complaint" against Munaf, which Romania did not in fact authorize. J.A. 54-55; 62-63; J.A. 67-68, 70. Munaf further alleges that U.S. officials held *ex parte* conversations with the presiding judicial officer immediately prior to the imposition of his death sentence. J.A. 55-56. This alleged misconduct alone made Munaf "more vulnerable to danger [than] had they not intervened." *Kneipp v. Tedder,* 95 F.3d 1199, 1209 (3d Cir. 1996). *See also United States. v. Karake*, 281 F. Supp. 2d 302 (D.D.C. 2003) (permitting discovery to evaluate the possibility of a joint venture between U.S. and Rwandan officials to deprive citizen of constitutional rights).[48]

The government's violation of Omar and Munaf's substantive due process rights is exacerbated by their prolonged detention, which created a "special relationship" between the parties. *DeShaney*, 489 U.S. at 199-200; *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (obligation to protect prisoners from third parties where the state "stripped" them of "virtually every means of self-protection and foreclosed their access to outside

---

[48] Omar's further claim that the government intends to "turn [him] over to the custody of Iraqi authorities in an effort to evade the strictures of United States law," J.A. 117, alleges an independent violation of due process warranting further factual inquiry. *See Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 40 (D.D.C. 2004) (government does not possess "unreviewable power to separate an American citizen from the most fundamental of his constitutional rights merely by choosing where he will be detained or who will detain him").

aid"); *Wang v. Reno*, 81 F.3d 808, 818 (9th Cir. 1996) (by paroling witness into United States to testify and placing him in custody, government "created a special relationship" that carried obligation to protect him from resulting liberty deprivations that would occur upon transfer). As a result of this "special relationship," the U.S. government cannot disclaim responsibility for the resulting, foreseeable harm that would follow, even if carried out by third parties.[49]

C. Neither Separation of Powers Principles Nor the Rule of Non-Inquiry Prohibit Judicial Inquiry into the Risk of Torture Upon Transfer.

The government asserts that the rule of non-inquiry and its underlying separation of powers

---

[49] Cases rejecting the availability of the state-created danger defense to deportation, do so for reasons that would only support the doctrine's applicability in this transfer context. *See, e.g., Kamara v. Att'y Gen. of the U.S.*, 420 F.3d 202, 216-17 (3d Cir. 2005); *Guerra v. Gonzales*, 138 F.App'x 697, 699 (5th Cir. 2005). First, in those cases, unlike here, the petitioners failed to allege that U.S. actors contributed in any way to the danger abroad or rendered non-citizens more vulnerable to such harm. Second, those deportation decisions are premised on separation of powers concerns about supplanting the fully-developed and exclusive statutory framework for handling refugee claims of persecution or torture under the INA. *See Kamara*, 420 F.3d at 217-18. In this case, by contrast, the government's failure to follow constitutional or statutorily-mandated procedures in advance of transfer suggests a stronger role for the judicial branch in placing a substantive limit on executive conduct.

principles categorically shield any aspect of their transfer decision from judicial review. G. Br. at 45-47. Such a broad understanding of the rule is unsupported by law or theory. Indeed, the government's assertion that the concerns underlying the rule are "even stronger" outside the extradition context, G. Br. at 47 – that is, when the executive acts unconstrained by law – stands the rule on its head.[50]

The rule of non-inquiry, a federal common law principle, emerges by implication from the statutorily-delegated responsibilities that are divided between the judicial and executive branches. The rule cannot be removed from the well-structured extradition context in order to give the executive a blank check to transfer U.S. citizens into patently inhumane conditions. And, even if the rule could be extended outside the extradition process, it would in no way bar judicial review of Omar and Munaf's specific transfer-related claims in this case.

First, the common law rule of non-inquiry is plainly trumped by statutory obligations expressly imposed upon judges by FARRA, which *mandate* an inquiry into the possibility of torture by a foreign government. Second, nothing in the rule prohibits inquiry into the constitutionality of a U.S. official's

---

[50] The government unfairly casts Omar's claim as asserting "a right to evade Iraqi jurisdiction." G. Br. at 47. In fact, in addition to asserting an entitlement to a challenge to the lawfulness of U.S. detention, Resp't. Br. 20, Omar and Munaf invoke their right to be free from torture.

decision to transfer. Finally, the rule itself affords an exception where a possible transfer would subject the petitioner to treatment that would offend the court's sense of decency, such as subjection to torture. *See Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960).

1. The Government Cannot Invoke the Rule of Non-Inquiry Where it has Failed to Abide by any of the Preconditions that Might Trigger its Application.

The rule of non-inquiry emerges as part of the formal extradition process, and the principles underlying it mandate that the rule be limited to that context. *See generally*, M. Cherif Bassiouni, *The Law of International Extradition: United States Law and Practice* 604-42 (5th ed. 2007). Thus, the government may not invoke the rule of non-inquiry to shield its conduct here, particularly where it has failed in the first instance to abide by the extradition regime's clear statutory framework. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-40 (1952) (Jackson, J., concurring) (judicial power to scrutinize executive conduct greater when executive is acting contrary to express or implied will of Congress).

Extradition, which must be pursued according to statute, *see* 18 U.S.C. § 3184, contemplates a "two-step procedure" which divides responsibility between a "judicial officer and the Secretary of State." *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir. 1997). Once a magistrate finds the

person extraditable, the Secretary of State thereafter is statutorily authorized to reverse the determination, decline to extradite on a range of discretionary factors, affirmatively authorize the extradition, or attach conditions to the transfer. *See* 18 U.S.C. § 3196; *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997); Bassiouni, *International Extradition, supra* at 951.

The rule of non-inquiry derives directly from this statutory division of responsibility, by which the judiciary defers to the Secretary of State's discretion regarding a range of foreign relations considerations. S*ee e.g.*, *Kin-Hong*, 110 F.3d at 111 n.12 (rule of non-inquiry "defers" assessment about potential treatment "to the second part of every extradition proceeding – review of extraditability and determination of the appropriateness of surrender by the Secretary of State"); *Koskotas v. Roche*, 931 F.2d 169, 174 (1st Cir. 1991) (declining to consider fairness of Greek trial procedures upon extradition because under 18 U.S.C. § 3186, petitioner "may raise these concerns with the Secretary of State"); *accord Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005), *cert. denied*, 546 U.S. 1171 (2006).[51] It follows that the courts cannot be stripped of their role to examine transfer decisions under the rule of non-inquiry, when the executive has deliberately eschewed the statutory framework that would trigger the applicability of rule in the first instance. That is the case here.

---

[51] That discretion, however, is finally limited where there is a credible claim of torture. *See infra* at Part II.C.2(a).

2. Even if the Rule of Non-Inquiry Could be Applied Outside the Extradition Context, It Would Have No Relevance to the Statutory and Constitutional Claims Asserted by Omar and Munaf.

Even if the government were correct that principles underlying the rule of non-inquiry apply outside the formal extradition context, the rule would not bar judicial inquiry into the lawfulness of the transfer asserted by Omar and Munaf in this case. First, they challenge the executive's failure to abide by binding statute which specifically commands judicial inquiry into the likelihood of torture upon transfer. Second, Omar and Munaf challenge the constitutionality of United States actions as part of the decision to transfer, not the legitimacy of Iraqi trial procedures. Finally, the rule of non-inquiry itself contains a recognized exception for potential transfers into torture.

a. The Passage of FARRA Mandates Judicial Inquiry into the Risk of Torture.

The rule of non-inquiry, a product of the federal common law, cannot stand in the face of a federal statute. *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) ("We have always recognized that federal common law is subject to the paramount authority of Congress.") (internal quotations omitted); *see* Bassiouni, *International Extradition*, *supra* at 796. As described, FARRA broadly prohibits any form of transfer into possible torture and is thus fully

enforceable through habeas corpus. *See supra* Part II.A. Thus, even the broadest construction of the rule of non-inquiry would be trumped by a judicial obligation to ensure compliance with FARRA. This obligation, in turn, requires a federal court to inquire into the potential treatment a petitioner may receive at the hands of a foreign government. *See Mironescu*, 480 F.3d at 671 (recognizing that federal law embodied in FARRA now unambiguously makes potential treatment on transfer relevant and justiciable in habeas); *cf. In re Artt*, 158 F.3d 462, 474-75 (9th Cir. 1998) (1985 U.S.-U.K. extradition treaty mandates inquiry into British judicial system).[52]

Far from offending principles of international comity or questioning the quality of the Iraqi criminal justice system, G. Br. at 47, the district court pursuant to a FARRA claim "would be required to answer only the straightforward question of whether a fugitive would likely face torture in the requesting country." *Mironescu*, 480 F.3d at 672. And myriad decisions review identical inquiries undertaken as part of asylum laws, *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987) (alien eligible for asylum upon demonstration of a "well-founded fear of persecution" in his home country). Moreover, even in the extradition framework, a

---

[52] All of the cases cited by the government in support of its contention that the rule of non-inquiry categorically bars any judicial role predate the enactment of FARRA, except for *Prasoprat*, 421 F.3d 1009, in which allegations of potential torture on transfer were not raised by the petitioner.

habeas court may be called upon to apply the "political offense" exception, which requires a sensitive judicial inquiry into the foreign sovereign's motivation for charging the habeas petitioner. *See, e.g., Ordinola v. Hackman*, 478 F.3d 588, 595 (4th Cir. 2007) ("the vast majority of modern-day extradition treaties" provide a political offense exception to extradition); *Koskotas*, 931 F.2d at 172-73 (detailing nature of judicial inquiry under political offense exception).[53]

Not even the government's unilateral assurance that it would "object" to the transfer of Omar and Munaf if "it believed that they would likely be tortured," G. Br. at 47, displaces that judicial review mandated by federal law. *See Khouzam v. Hogan*, No. 07-0992, slip op. at 19 ("consultation among members of the Executive Branch . . . does not satisfy the constraint of the Fifth Amendment").

Finally, even if the government chooses – or is ordered by the court – to follow the procedures set forth in the extradition statute, 18 U.S.C. § 3184; *see*

---

[53] Numerous courts have also issued injunctions barring transfers of habeas petitioners out of DoD custody and into the possibility of torture by a third country, despite government contentions that such relief would violate the rule of non-inquiry. *See Al-Marri v. Bush*, 2005 WL 774843 (D.D.C. 2005); *El-Banna v. Bush*, 2005 WL 1903561 (D.D.C. 2005); *Al-Joudi v. Bush*, 406 F. Supp. 2d. 13 (D.D.C. 2005); *Al-Shihry v. Bush*, 2005 WL 1384680 (D.D.C. 2005); *Abdah v. Bush*, 2005 WL 589812 (D.D.C. 2005). *But see Al-Anazi v. Bush*, 370 F. Supp. 2d. 188, 195 (D.D.C. 2005).

Brief of *Amicus Curiae* M. Cherif Bassiouni *et al.*, the Habeas Petitioners could ultimately utilize FARRA to challenge the Secretary of State's decision to certify his extraditability. *See Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1015-16 (9th Cir. 2000) (in light of FARRA, habeas petitioner could obtain judicial review under APA of Secretary of State's decision to extradite in spite of asserted likelihood of torture).

b. The Rule of Non-Inquiry Does Not Bar Challenges to the Constitutionality of U.S. Government Conduct.

Contrary to the government's claim, Omar and Munaf do not challenge whether the Iraqi criminal system fails U.S. constitutional standards or is otherwise procedurally defective. *See* G. Br. at 45-46. Instead, as specifically described, *supra* Part II.B. Omar and Munaf contend that U.S. officials, by undertaking a series of unlawful actions in an attempt to effect an extrajudicial transfer, are here violating Omar and Munaf's due process rights. *See also* R. Br. at 45-53.

A court is equally competent to judge the constitutionality of U.S. actions whether they occur at home or abroad. *See Reid v. Covert*, 354 U.S. 1, 7-9 (1957). Similarly, an extradition or extra-judicial transfer that violates a citizen's constitutional rights is clearly reviewable in habeas. In *Mironescu*, 480 F.3d at 671-72, the court specifically distinguished extradition cases relied upon by the government, including *Neely v. Henkel*, 180 U.S. 109, 123 (1901),

raising challenges to foreign trial systems and barred by the rule of non-inquiry, from constitutional challenges to U.S. government action which could not be so barred. The court rejected the claim that the executive has plenary extradition or transfer power for, while the executive "has unlimited discretion to *refuse* to extradite a fugitive, it lacks the discretion to extradite a fugitive when extradition would violate his constitutional rights." *Id.* at 670 (internal citations omitted). *See also Wang*, 81 F.3d at 816 (affirming injunction issued against deportation where habeas petitioner raised substantive due process claims against U.S. government actors "wholly independent of any [claims] assertable under the INA"); *In re Burt*, 737 F.2d 1477, 1482-85 (7th Cir. 1984) (affirming district court's consideration of procedural due process claim in habeas challenge to extradition). In sum, despite the asserted foreign relations context of this case, the judicial branch must retain its traditional role of examining executive conduct "when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. at 536. Nothing less is at stake here.

c. The Rule of Non-Inquiry Itself Contains a Well-Recognized Exception for Transfers Into Torture.

Finally, courts applying the rule of non-inquiry themselves recognize an exception for transfer based on a plausible fear of torture. *See Gallina*, 278 F.2d at 79 (recognizing that courts may block extradition in situations in which "relator, upon extradition, would be subject to procedures or

punishment so antipathetic to a federal court's sense of decency"); *accord Kin-Hong*, 110 F.3d at 112; *Prushinowski v. Samples*, 734 F.2d 1016, 1019 (4th Cir. 1984); *Lopez-Smith*, 121 F.3d at 1322; *Hoxha v. Levi*, 465 F.3d 554 (3d Cir. 2006). Torture is rightly considered *sui generis* and thus manifestly distinct from routine variations among criminal justice systems that courts avoid evaluating. *See Burt*, 737 F.2d at 1485 n.11 (foreign state's criminal process may lose otherwise routine "presumption of fairness" if relator demonstrates transfer would expose to treatment "antipathetic to a federal court's sense of decency"); *accord Parretti v. United States*, 122 F.3d 758 (9th Cir. 1997). For this reason too, even independent of CAT and FARRA, petitioners are entitled to challenge in the district court their transfer into possible torture.

CONCLUSION

For the foregoing reasons, the D.C. Circuit's decision in *Geren v. Omar*, No. 07-397, should be affirmed and its decision in *Munaf v. Geren*, 06-166 should be vacated and remanded for further proceedings.

Respectfully submitted,

BAHER AZMY
JENNY-BROOKE CONDON
SETON HALL UNIVERSITY
SCHOOL OF LAW
CENTER FOR SOCIAL JUSTICE
Newark, NJ 07102
(973) 642-8700

JOHN G. GIBBONS*
LAWRENCE S. LUSTBERG
AVIDAN Y. COVER
GIBBONS, P.C.
One Gateway Center,
Newark, NJ 07102
(973) 596-4500

* *Counsel of Record*

February 28, 2008

APPENDIX

Amicus **Human Rights Watch** ("HRW") is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring public pressure upon offending governments and others to end abusive prac-tices. For the past six years, HRW has worked extensively to document U.S. counterterrorism policies and practices and to promote effective and lawful responses to terrorist threats. HRW has monitored and reported on human rights in Iraq since the early 1990s.

Amicus **Human Rights First** ("HRF") is a non-profit, nonpartisan organization that has worked since 1978 to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. HRF protects people at risk: refugees who flee persecution, victims of crimes against humanity or other mass human rights violations, victims of discrimination, those whose rights are eroded in the name of national security and human rights advocates who are targeted for defending the rights of others. HRF works to prevent violations against these groups and to seek justice and accountability for violations against them.

Amicus **Center for Constitutional Rights** ("CCR") is a non-profit legal and educational

organization dedicated to protecting and advancing the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. CCR uses litigation proactively to advance the law in a positive direction, to empower poor communities and communities of color, to guarantee the rights of those with the fewest protections and least access to legal resources, and to strengthen the broader movement for constitutional and human rights. In addition to CCR's long history of advocating on behalf of civil rights, CCR has been instrumental in advancing the protection of international human rights. Currently, CCR represents several individuals who have been, or are in danger of being, transferred from U.S. custody to the custody of foreign governments despite known risks of torture or cruel, inhuman or degrading treatment.

Amicus **Physicians for Human Rights** ("PHR"), since 1986, has mobilized health professionals to advance the health and dignity of all people through action that promotes respect for human rights. PHR has been in the forefront of the global fight against torture and was one of the lead authors of the Istanbul Protocol on documenting torture adopted by the United Nations in 1999. PHR joins in this brief in support of constitutional principles and international instruments prohibiting torture.

Amicus **Islamic Society of North America** ("ISNA") was established in 1981 as an association of Muslim organizations and individuals that provides a common platform for presenting Islam, supporting

Muslim communities, developing educational, social and outreach programs and fostering good relations with other religious communities, as well as with civic and service organizations. ISNA is a founding member of the National Religious Campaign Against Torture and has been a consistent advocate for human rights and dignity for all persons.

Amicus **Evangelicals for Human Rights** ("EHR") is a project of the National Religious Campaign Against Torture that seeks to articulate a compelling biblical case for a zero-tolerance stance on torture by any government for any reason, including the United States in its war on terror, and advocate the application of that commitment in the conduct of the U.S. war on terror. Founded in 2006, HER focuses its education efforts on the evangelical community and seeks to reaffirm the centrality of human rights as an unshakeable biblical obligation fundamental to an evangelical Christian social and moral vision.

Amicus **Muslim Advocates** is a nonprofit educational, charitable entity dedicated to promoting and protecting freedom, justice and equality for all, regardless of faith, using the tools of legal advocacy, policy engagement and education and by serving as a legal resource to promote the full participation of Muslims in American civic life. Founded in 2005, Muslim Advocates is a sister entity to the National Association of Muslim Lawyers, a network of over 500 Muslim American legal professionals. Muslim Advocates seeks to protect the founding values of our nation and believes our nation and its people can be

safe and secure without sacrificing constitutional rights and protections.